SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 531

WYNDHAM ASSOCIATES, *et al.*,

Petitioners,

against

DAVID C. BINTLIFF, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS DAVID C. BINTLIFF, A. G. McNEESE, JR., L. B. TYBOR, MORONEY, BEISSNER & CO., INC. and A. G. BECKER & CO., INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions Below

The opinion of the Court of Appeals is reported at 398 F.2d 614. It is printed as Appendix A to the Petition (1a-15a).*

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* References in parentheses followed by the suffix "J" are to Joint Appendix filed in the Court of Appeals; references followed by the suffix "a" are to the Appendix to the Petition for Certiorari.

The opinion of the District Court has not yet been officially reported. It is printed as Appendix B to the Petition (17a-30a).

Questions Presented

1. Whether, in an action involving multiple parties and claims, the District Court has the discretionary power, pursuant to Rule 21, to sever collateral and peripheral claims against certain defendants when sufficient and compelling reasons exist therefor—or is a finding of misjoinder a necessary prerequisite to severance?

2. Whether the District Court has the power to transfer an action pursuant to 28 U.S.C. § 1404(a) from which claims against certain defendants have been properly severed pursuant to Rule 21—or does severance preclude transfer?

Statement of the Case

Petitioners seek review of a decision of the United States Court of Appeals for the Second Circuit rendered pursuant to 28 U.S.C. § 1292(b), affirming orders of the District Court which directed the severance of certain collateral claims against two defendants pursuant to Rule 21 of the Federal Rules of Civil Procedure and the transfer of the remaining civil action to another district pursuant to 28 U.S.C. § 1404(a).

These actions constitute but two of a series of suits brought principally by stockholders of Westec Corporation (Westec)—a Nevada corporation with its principal place of business in Houston, Texas (42J)—in the Southern District of New York, alleging violations of the Securities

Acts arising out of transactions involving the stock of Westec (43J). Ten of these actions were transferred pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Southern District of Texas, Houston Division, by order of the Honorable Edward W. Weinfeld in *Schneider* v. *Sears,* 265 F. Supp. 257 (S.D.N.Y. 1967). Further, an eleventh action, *Cosmos Bank* v. *Bintliff,* 67 Civ. 1984, S.D.N.Y., July 14, 1967, was transferred to the Houston Division pursuant to the order of the Honorable Edmund L. Palmieri, entered on July 20, 1967 (48J-49J).

In addition to the eleven actions transferred from this District, there are numerous proceedings pending in the U. S. District Court in Houston relating to alleged manipulation in the stock of Westec (45J, 67J). Westec, itself, is in reorganization proceedings in Houston pursuant to a petition filed under Chapter X of the Bankruptcy Act, which was approved by the District Court in Houston on September 27, 1966, and a Trustee appointed (45J).

Three additional suits concerning alleged manipulation in Westec stock are pending in the Southern District of Texas in which defendants David C. Bintliff (Bintliff), Moroney, Beissner & Co., Inc. (Moroney), A. G. Becker & Co., Inc. (Becker), and Goodkind, Neufeld & Co., Inc. (Goodkind) are named with a multitude of other defendants (45J-46J). Furthermore, the Securities and Exchange Commission (SEC) is conducting an investigation in Houston, Texas relating to the trading in Westec stock. Numerous subpoenas for records of various banks, corporations and individuals have been issued in connection with the SEC proceedings. Defendant Bintliff has testified as a witness in these proceedings and has produced, pursuant to a subpoena, his personal records (46J).

In addition, in connection with the Westec reorganization proceedings now pending in the United States District Court in Houston, the attorney for the Trustee has taken testimony for the purpose of enabling him to determine what civil actions, if any, would be filed in the Southern District of Texas, Houston Division, in behalf of Westec. Defendant Bintliff and one of his associates already have given testimony and produced records in this proceeding directly relating to the transactions here in issue (46J-47J). Moreover, after completing his investigation, the Trustee on August 26, 1968, filed an action in the Southern District of Texas, Houston Division, in behalf of Westec, naming as defendants *inter alia* Bintliff, Becker, Goodkind and Moroney. The complaint in that action, consisting of thirty-two printed pages, raises numerous claims on behalf of Westec, including the basic claims sought to be litigated against the above named defendants in the instant action. In paragraph 2 of his complaint, the Trustee specifically alleges that the action is brought "as a class action for all persons who sustained a loss as a result of any purchase of . . . the common stock of [Westec] between September 2, 1964 and August 25, 1966,* or who otherwise were injured as a result of the unlawful practices, conduct and activities described herein or who were damaged as a consequence thereof who may appear herein and prove their claims as provided in Rule 23, Federal Rules of Civil Procedure, as amended." **

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* Petitioners herein allege that they purchased their Westec common stock during the period September 28, 1965 through August 24, 1966.

** This Court is respectfully requested to take judicial notice of the complaint filed in the Trustee's action, *Carpenter* v. *E. M. Hall, Jr., et al.*, C.A. No. 68-H-738, U.S. District Court, S.D. Texas, Houston Div., Aug. 26, 1968.

Judge Allen B. Hannay of the United States District Court in Houston has been designated to supervise the Westec reorganization and the cases related thereto. In addition, Judge Hannay has been designated to sit in the ten stockholder actions transferred from the Southern District of New York, and in the stockholder actions originally filed in Houston (49J).

Wyndham Associates, et al. v. *Bintliff, et al.*, 67 Civ. 2611, the first action commenced by petitioners herein, was filed in the Southern District of New York on July 7, 1967 (2J). The complaint, which seeks to enforce liabilities allegedly created under the Securities Act of 1933 (15 U.S.C. § 77a, *et seq.*) and the Securities Exchange Act of 1934 (15 U.S.C. § 78a, *et seq.*), alleges a scheme and conspiracy by defendant Bintliff and unnamed conspirators to inflate artificially the price of Westec stock (21J). The complaint further alleges that the stockbroker defendants—Moroney, Becker and Goodkind—"aided and abetted" this conspiracy by *inter alia* recommending the stock to the public and accepting orders from the alleged conspirators in fictitious names (25J).

In addition, the complaint in a vague and conclusory manner alleges that The American Stock Exchange (Amex) failed to exercise certain supervisory responsibilities imposed upon it by Section 6 of the Securities Exchange Act of 1934 (15 U.S.C. § 78f) (26J-27J). The precise manner in which Amex was allegedly negligent is not specified.

Finally, plaintiffs allege that they were misled in purchasing Westec stock at an artificial price, and that thereafter defendants disposed of their Westec stock and refused to continue to support the artificially created market (27J-29J). In addition to the named defendants, plaintiffs in-

clude defendants Doe Co. I through Doe Co. V (described as "financial institutions doing business in this district, including one or more national banks located in this district") and Roe Co. I through Roe Co. V (described as "brokerage houses, located in this district") (19J-20J).

The defendants in *Wyndham,* with the exception of Amex, Becker and Goodkind, are all citizens and residents of Houston, Harris County, Texas (40J). Defendants Bintliff, A. G. McNeese, Jr. (McNeese) and L. B. Tybor (Tybor) all reside in Houston (40J). Defendant Moroney is a Texas corporation with its principal office and place of business in Houston (40J). Defendants Amex and Goodkind have their principal offices and places of business in New York (139J, 93J). Defendant Becker has its principal office and place of business in Chicago, Illinois (80J).

The first motion addressed to this action was filed on August 31, 1967 by Amex and sought *inter alia* the severance, pursuant to Rule 21 of the Federal Rules of Civil Procedure (the Rules), of those claims involving Amex, on the basis that these claims were separate and unrelated to the claims asserted against the other defendants (98J).

After Amex's motion was filed and prior to the return date thereof, defendant Bintliff, on September 15, 1967, moved, pursuant to 28 U.S.C. § 1404(a), to transfer the *Wyndham* action to the United States District Court for the Southern District of Texas, Houston Division (31J). Similar transfer motions were filed by defendants McNeese, Tybor, Moroney and Becker on September 19, 1967 (62J). On September 20, 1967, defendant Goodkind filed separate motion papers in which it sought *inter alia* to dismiss the complaint as against it or, in the alternative, to separately state and sever the claims as against it (91J). Prior to

the return date of Amex's motion, the parties agreed to have the various severance and transfer motions argued at the same time (174J).

It was not until after the above motions for transfer and severance were filed that the plaintiffs in *Wyndham*, together with four additional plaintiffs, instituted, on September 21, 1967 (2J), a second action entitled *Friedman, et al.* v. *Bintliff, et al.*, 67 Civ. 3661 (4J). The *Friedman* complaint was nearly identical to the *Wyndham* complaint. The significant variations in the *Friedman* complaint were the dropping of the Roe and Doe defendants and the addition of The Chase Manhattan Bank, N. A. (Chase) as a defendant, the omission of any reference to "unnamed co-conspirators" of Bintliff, and the particularizing of the manner in which the stockbroker defendants (Becker, Goodkind and Moroney) purportedly participated with Bintliff in the alleged manipulative scheme.

Chase's connection with the alleged manipulative scheme was as vague and even more tenuous than that of Amex. Thus, the complaint simply asserted with respect to Chase that it "knew or should have known" that Bintliff and others associated with him were engaged "in an unlawful distribution of unregistered stock" and that Chase facilitated the distribution by recording transfers of control stock, thereby aiding and abetting defendant Bintliff in carrying out his manipulative plan (12J-13J).

Because of the apparent similarity between the *Wyndham* and *Friedman* actions and because certain defendants intended to move in addition to transfer the *Friedman* action, it was agreed by stipulation dated October 13, 1967, that the motions pending in *Wyndham* would be deemed also to have been made in *Friedman* (173J).

Chase, in addition to Amex and Goodkind, stated its intention to move for severance at the oral argument of these motions (210J-211J) and did so in its memorandum filed thereafter. Chase's motion was based on the ground that the claims made against it were separate and distinct from the main claim asserted by plaintiffs involving alleged stock manipulation and market rigging.

On November 8, 1967, the District Court rendered its opinion (17a-30a): (1) granting Amex's and Chase's motions for severance by directing that the claims as to each be severed into two separate actions; (2) denying Goodkind's motions to dismiss the action and to sever; and (3) transferring the remaining action to the Southern District of Texas pursuant to 28 U.S.C. § 1404(a). Separate orders embodying the District Court's determination were entered on November 30, 1967 (31a-38a).

In orders dated January 22, 1968, the Court of Appeals for the Second Circuit granted *inter alia* plaintiffs' and defendant Goodkind's applications for leave to appeal pursuant to 28 U.S.C. § 1292(b) (3J). On June 26, 1968, the Court of Appeals (Lumbard, Ch. J., Smith and Anderson, C.JJ.) rendered its opinion affirming in all respects the decision of the District Court (1a-15a).

Argument

Petitioners have failed to raise meritorious questions sufficient to warrant the consideration of this Court. Moreover, petitioners' reasons why the writ should be granted (Pet. p. 12) cannot withstand analysis.

Petitioners first contend that the courts below have misconstrued and improperly applied 28 U.S.C. § 1404(a), when

in fact both courts have interpreted and applied this section in accordance with principles previously annunciated by this Court and in harmony with the general tenor of modern federal practice. Petitioners further argue that there is an insufficient accommodation of the transfer provisions of § 1404(a) with certain other federal rules and statutes, when in fact both courts below have provided a well-reasoned accord between these various provisions. Finally, petitioners contend that the courts below erred in their selection of the proper criteria to be utilized by the District Court when considering a motion for transfer, when in fact both courts exercised great care in considering all the relevant circumstances, a practice consistent with the principles set forth by this Court in prior decisions.

In short, petitioners have failed to provide any basis for invoking this Court's certiorari jurisdiction. They are simply seeking a further interlocutory review of issues which have already been twice decided against them.

The courts below rather than "bypass[ing] in glib fashion" (Pet. p. 28 n.) the questions raised with respect to 28 U.S.C. § 1404(a), in fact not only considered these questions, but properly applied the "common sense" approach to this section dictated by the prior decisions of this Court. Petitioners' untenable, wholly distorted and contrary interpretation of § 1404(a) as encompassing the transfer of an action only as "brought originally" suffices only to obscure the issues before this Court.

What is before this Court is not whether the District Court could properly transfer "part of a civil action" but whether it properly exercised two separate and distinct discretionary powers, albeit one in conjunction with the other: (a) the severance of collateral and peripheral

claims against two defendants into separate civil actions pursuant to Rule 21; and following severance, (b) the transfer of the remaining civil action to another district pursuant to § 1404(a).

Petitioners, in effect, argue that a district court may have the power to sever and that it may have the power to transfer—but if a district court severs, it no longer possesses the power to transfer; and if it intends to transfer, it no longer possesses the power to sever. The upshot of this incredible logic is simply this—a district court is precluded from exercising these inherent discretionary powers contemporaneously.

Petitioners refer to the "mischievous consequences" (Pet. p. 20) that § 1404 was designed to prevent. Yet petitioners seek to have this Court provide a basis which could lead to these "mischievous consequences" through the simple expedient of artful and calculated joinder. Section 1404(a) cannot in law or logic be so construed as to allow parties opposed to a change in venue to defeat transfer by their own deliberate acts or omissions, and to thus obstruct the salutary results Congress sought to achieve in enacting this section.

I

The District Court Was Empowered Pursuant to Rule 21 To Sever The Collateral Claims Against Amex and Chase.

Petitioners correctly contend that an indispensable prerequisite to the result reached below was the severance of defendants Amex and Chase pursuant to Rule 21 (Pet. p. 28). They argue, however, that the District Court exceeded its power in ordering the severance since it did not

find that Amex and Chase were improperly joined. In short, petitioners contend that a finding of misjoinder is essential to severance pursuant to Rule 21.

Contrary to petitioners' contention, it is submitted that misjoinder is not a necessary prerequisite to severance under Rule 21 and that severance may be ordered when "sufficient other reasons" exist. Clearly, one such other reason is to effect transfer of the remaining action to a more convenient forum.

The last sentence of Rule 21 provides that "[a]ny claim against a party may be severed and proceeded with separately." This sentence vests the District Court with broad discretion to order a severance. As stated by the Court of Appeals below:

> "We believe that this provision authorizes the severance of any claim, even without a finding of improper joinder, where there are sufficient other reasons for ordering a severance. See *Sporia* v. *Pennsylvania Greyhound Lines*, 143 F.2d 105 (3d Cir. 1944)." (10a)

It cannot be disputed that the "sufficient other reason" for ordering a severance most frequently applied has been to permit the District Court to effect transfer of an action pursuant to § 1404(a). Thus, in *General Elec. Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699 (S.D.N.Y. 1966) and *Leesona Corp.* v. *Cotwood Mfg. Corp., Judson Mills Div.*, 204 F. Supp. 139 (W.D.S.C. 1962), *appeal dismissed*, 308 F.2d 895 (4th Cir. 1962), certain defendants were severed pursuant to Rule 21 solely to effect transfer of the remaining actions to a more convenient forum. In neither case did the court consider or determine whether the severed defendants had been misjoined within the meaning of Rule 21.

The commentators lend further support to the discretionary power of a district court to sever, pursuant to Rule 21, solely to effect transfer. As Professor Moore states:

> "Even where the venue is proper as to all the joined claims, and the forum is a convenient one for some, but not all, of the claims, the court might properly sever and transfer certain of the claims to a proper and more convenient forum." 3A MOORE, FEDERAL PRACTICE ¶21.05, at 2911 (2d ed. 1968).

Similarly, 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.2 (Supp. 1967) at 284 notes:

> "Where it is possible to transfer some claims to another, more convenient district, but other claims cannot be transferred, the court has power under Rule 21 to sever the claims and transfer the transferable claims . . . ."

Thus, there is ample authority supporting the compelling conclusion that the District Court may, pursuant to Rule 21, sever certain parties solely to effect transfer of an action to a more convenient forum.

The District Court's exercise of its power to sever Chase and Amex was proper here for still another reason. Contrary to the impression petitioners attempt to create, the effect of the District Court's order was not to fragment into three separate actions claims which were inextricably intertwined. As previously demonstrated, and as argued below,*

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* Both Amex and Chase moved for severance in the District Court on the ground that the allegations as to each of them were separate and unrelated to the allegations as to the other defendants. While the District Court did not pass upon this aspect of Chase's motion for severance, it did sever Amex for precisely that reason (26a).

the claims against Amex and Chase are separate from and unrelated to the core claim of manipulation. This factor was considered and relied upon by the Court of Appeals in its opinion wherein it stated that the claims against Amex and Chase "are alleged to be only indirectly connected to the manipulations which form the main subject matter of the action" (10a-11a) (footnote omitted). After noting this, the Court of Appeals approved the orders of the District Court which severed Amex and Chase, stating:

> "Otherwise, a plaintiff could preclude the court from considering whether transfer would serve the interest of justice by including a defendant, not subject to suit in the more convenient district, who was in some manner peripherally involved in the alleged wrongdoing." (11a)

In light of the foregoing, it is submitted that the District Court's severance of Amex and Chase to effect transfer of the core claims to Houston was a proper exercise of the power it possessed under Rule 21.

II

The District Court Has The Power To Transfer An Action Pursuant To 28 U.S.C. § 1404(a) From Which Claims Against Certain Defendants Have Been Properly Severed Pursuant To Rule 21.

28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The crux of plaintiffs' opposition to the decisions rendered below turns

on their argument that § 1404(a) allows the transfer of a civil action only as "originally brought." Thus, they argue that even if the District Court's order of severance is proper, the remaining "civil action" is somehow permanently crippled and incapable of transfer to another district.

Petitioners' reliance on this Court's holding in *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960), to support this narrow and illogical interpretation of § 1404(a) is misplaced. There, the plaintiffs, having joined in a single complaint both in rem and in personam damage claims, opposed transfer to a more convenient forum on the ground that the in rem claim could not have been brought in the transferee forum. This Court rejected that argument, however, noting that failure to adopt a "common-sense approach . . . would practically scuttle the forum non conveniens statute so far as admiralty actions are concerned." *Id.* at 24. The Court reasoned: "All a plaintiff would need to do to escape from [Section 1404(a)] entirely would be to bring his action against both the owner and the ship, as was done here." *Id.* at 24-25.

The "common-sense" approach to § 1404(a) was again adopted by this Court in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964). There, the Court of Appeals for the Third Circuit had vacated an order of the District Court transferring forty wrongful death actions from Pennsylvania to Massachusetts, on the ground that the actions might not have been brought in Massachusetts since the plaintiffs were not qualified to sue there. In reversing the judgment of the Court of Appeals, the Supreme Court, after noting that its decision in *Continental* required a "common-sense" approach to § 1404(a), stated:

> "The possibilities thus suggested by the facts of the present case amply demonstrate that the limiting phrase of § 1404(a) should be construed to prevent parties who are opposed to a change of venue from defeating a transfer which, but for their own deliberate acts or omissions, would be proper, convenient and just." *Id.* at 624.

This Court's admonishments in *Continental* and *Van Dusen* are equally applicable here. If "civil action" is interpreted as meaning only the action as brought originally, the result would be to practically "scuttle" § 1404(a) so far as Securities Acts cases are concerned. All that plaintiff need do to escape § 1404(a) entirely would be to artfully join a defendant as to whom venue in a transferee district would be improper. Such gamesmanship should not be countenanced but must be made ineffectual. Only by interpreting "civil action" under § 1404(a) as meaning the action actually transferred may this be accomplished.*

In a further attempt to find support for the proposition that "civil action" under § 1404(a) is to be interpreted as applying only to an action as originally brought, petitioners erroneously rely on this Court's holding in *Hoffman* v.

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* While petitioners' arguments in support of their restrictive interpretation of § 1404(a) are replete with references to the "liberal" joinder provisions contained in the Federal Rules, petitioners make no attempt to place these provisions within the more pervasive scheme of modern federal practice. The underlying principle is that all rules are to be construed so as to "secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. However, petitioners would have this Court construe the Rules for joinder liberally, while applying only the strictest interpretation to the provisions governing severance and transfer. They would have this Court carefully weigh such factors as the convenience of the parties and economy of judicial administration when considering joinder, but wholly ignore them when considering severance and transfer.

Blaski, 363 U.S. 335 (1960). There, the defendant sought to effect transfer by consenting to suit in the transferee district where venue was originally improper. In affirming the denial of defendant's motion to transfer, this Court held that the *defendant's consent* could not cure the originally improper venue as to it in the transferee district.

The decision in *Hoffman* was grounded on two interrelated propositions: (1) that to permit a defendant to increase the number of districts in which a trial can be held constitutes gross discrimination by giving the defendant an advantage which the plaintiff does not have; and (2) that § 1404(a) plainly does not mean "where [the action] may now be rebrought with defendant's consent." 363 U.S. 335, 343. Subsequent interpretation of this decision clearly indicates that *Hoffman* is restricted to the proposition that the *conduct or consent of the defendant* after the institution of suit cannot add to the forums to which a suit can be transferred. See, *e.g.*, *Pruess* v. *Udall*, 359 F.2d 615, 618 (D.C. Cir. 1965); *Cessna Aircraft Co.* v. *Brown*, 348 F.2d 689, 692 (10th Cir. 1965); *Jaffe* v. *Dolan*, 264 F. Supp. 845, 847 (E.D.N.Y. 1967); *Independent Fish Co.* v. *Phinney*, 252 F. Supp. 952, 953 (W.D. Tex. 1966). *Hoffman* neither holds nor suggests that a *court ordered* severance of an original party prevents transfer of the civil action as it is then constituted.

Leesona Corp. v. *Cotwool Mfg. Corp., Judson Mills Div.*, 204 F. Supp. 139 (W.D.S.C. 1962), *appeal dismissed*, 308 F.2d 895 (4th Cir. 1962), makes clear that a severance and transfer are entirely consistent with *Hoffman*. There, the court granted a motion to sever and transfer as to one of three defendants, noting that such defendant was a resident and had its place of business in the transferee district,

and that all informed witnesses as well as records of the transferred defendants were located in that district. In concluding that the relief of severance and transfer was entirely consistent with *Hoffman,* the court stated:

> "Plaintiff relies upon the decision in Hoffman v. Blaski .... This decision is consistent with the relief sought by this motion. There the Supreme Court held that an action for patent infringement may not be transferred to a district where the venue would be improper under 28 U.S.C.A. § 1400(b). In the present case plaintiff could have brought the action against [the transferred defendant] in Massachusetts where [the transferred defendant] resides." *Id.* at 141.

The court went on to say that inasmuch as the non-transferred defendants "are not seeking transfer, the propriety of a patent infringement suit against them in Massachusetts is irrelevant." *Ibid.*

Similarly, in *General Elec. Credit Corp.* v. *James Talcott, Inc.,* 271 F. Supp. 699 (S.D.N.Y. 1966), the court severed the defendant found not to be subject to venue in the transferee court and transferred the civil action, as then constituted, to the transferee district. And in *Callan* v. *Lillybelle, Ltd.,* 234 F. Supp. 773 (D.N.J. 1964), the court dropped one of the defendants solely for the purpose of curing a jurisdictional defect and then transferred the action as then constituted. Clearly, the actions transferred in *General Electric* and *Callan* were not the actions as "brought originally," nor need the actions transferred herein be so denominated in order to sustain the decision of the District Court. As was found by the Court of Appeals:

> "We agree that this section authorizes the transfer only of an entire action and not of individual claims.

> However, we do not agree that an entire action must mean the action as originally brought. Where certain claims are properly severed, the result is that there are then two or more separate 'actions,' and the district court may, pursuant to § 1404(a), transfer certain of such separate actions while retaining jurisdiction of others." (10a)

In a final effort to support their restrictive construction of § 1404(a), petitioners baldly assert that "the result reached below is one which will 'bring about the kind of mischievous consequence against the "interest of justice" that § 1404 was designed to prevent'. . ." (Pet. p. 20). Admittedly, the decisions below may cause some inconvenience to petitioners. However, the courts below took this factor into consideration and concluded that there was "ample basis" to support the transfer. As stated by Judge Palmieri in *Cosmos Bank, supra,* and quoted with approval by the Court of Appeals:

> "Overriding, however, all that has been said [in opposition to transfer] is a consideration affecting the expeditious management of court business which argues persuasively for the transfer. Judge Allen B. Hannay of the United States District Court in Houston has been designated to supervise the Westec reorganization proceedings and the cases related thereto. In addition, Judge Hannay has been designated to sit in the ten derivative actions transferred from this district and in a number of stockholder actions filed in the District Court in Houston. His familiarity with the legal problems, attorneys, witnesses, and exhibits relating to the affairs of Westec constitutes a precious asset, increasing in value with the passage of time, and which will undoubtedly lighten the burden of litigants and courts alike. . . .

> In short, the husbanding of judicial effort and the importance of rendering expeditious service to litigants, support transfer rather than retention of the case." (12a-13a)

In view of the foregoing, it is submitted that petitioners have raised no issue of substance with respect to the power of the District Court to transfer the action, as severed, to Houston pursuant to § 1404(a). Moreover, a considered review of all the facts compels the conclusion that the District Court was not only empowered to exercise the several discretionary powers in issue but that the exercise thereof was in all respects prudent and proper under the circumstances.

CONCLUSION

The writ should be denied for the reasons hereinabove stated.

Respectfully submitted,

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